No. 1225

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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

JOSEPH H. MOSKOWITZ,
Petitioner,
—against—
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN W. DAVIS,
Counsel for Petitioner.

BERTRAM S. NAYFACK,
RUSSEL S. COUTANT,
A. H. FRISCH,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph H. Moskowitz, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a conviction in the United States District Court for the Southern District of New York under an indictment charging wilful attempt to evade and defeat the income taxes of Joseph M. Schenck for the calendar year 1936 (Count 2), in violation of Section 145 (b) of the Revenue Act of 1936 (Section 145 (b) of Title 26 U. S. C.).

The Statute.

Petitioner is charged with violating Section 145 (b) of the Revenue Act of 1936. This section provides:

"* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or

the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than five years, or both, together with the costs of prosecution."

Opinion Below.

The Opinion of the Court below dated March 21st, 1942, not yet reported, is annexed to the certified transcript of the record (R. 3616-30).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. Title 28, Sec. 347 (a)), and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

On April 6, 1942, the Court below granted petitioner's motion to stay the issuance of its mandate pending the application to this Court for a writ of *certiorari*.

Summary Statement of Matters Involved.

Petitioner has been associated with Joseph M. Schenck in various capacities in the motion picture industry from 1918 to date. Schenck, in 1936, was chairman of the board of directors of Twentieth Century-Fox Film Corporation (R. 1482) and for years has been one of the leaders of the motion picture industry (R. 1470-3, 1477-8). Schenck's standing in the industry was due largely to his ability to deal with the temperamental stars and actors in the industry (R. 1231-2). To broaden and strengthen his contacts with the motion picture people, Schenck entertained lavishly (Ex. A-6, R. 2976; R. 1786; R. 1500). Petitioner's duties

included the supervision and responsibility for Schenck's books and tax returns. Each year petitioner compiled the necessary data needed for Schenck's federal income tax return and submitted it to an experienced tax accountant, who prepared the returns from information supplied him by petitioner (R. 1488, 1491-5). Petitioner himself is neither a tax expert nor an accountant (R. 1486-7).

Petitioner and Schenck were indicted on four counts:

Count one charged that the attempt was made for 1935 by (a) wilful failure to report $2,000. of income; (b) fraudulent deductions of about $276,000. of stock sales losses, and (c) fraudulent deductions of about $25,000. of business and entertainment expenses.

Count two charged a similar attempt for 1936 by deductions of about $40,000. of business and entertainment expenses.

Count three charged a similar attempt for 1937 by (a) deductions of about $85,000. of business and entertainment expenses, and (b) wilful failure to report income of $100,000.

Count four charged a conspiracy to commit the substantive crimes stated in the first three counts.

Petitioner and Schenck were tried together. After a 6 weeks' trial, petitioner was found guilty only on count two, was acquitted on counts one, three and four, was fined $10,000. and sentenced to imprisonment for a year and a day. Schenck was convicted on counts one and two, and was acquitted on counts three and four.

Each of the substantive counts involved business expense deductions essentially of the same type consisting mainly of entertainment and traveling expenses, and were computed

by a similar estimate method* (R. 359, 1496). The same method had been used without challenge in preceding years (R. 1515).

The assignments of error which are urged deal with count 2 and here include errors with respect to the admission and exclusion of evidence, and errors in the Court's charge and refusal of requests to charge.

I.

The erroneous admission of Exhibit 148.

At the trial the Government introduced Exhibit 148, a copy of which is printed in the appendix hereto. This exhibit is a recomputation of the additional taxes claimed by the Government to be due.

Of a total spent in 1936 of about $220,000** (R. 1127; 2747), only $44,676.60 (R. 2882) was the subject of the fraud charged in the indictment. Vouchers covering these expenses were in envelopes which were introduced en masse in evidence as Exhibits 8-f, 8-g, 8-h, 8-l, and 8-m. Of these vouchers,*** some showed on their face that they were for business purposes, others that they were for personal purposes; but in a vast majority of cases the vouchers themselves did not show on their face whether the expenses which they covered were for personal or for business purposes.

Apart from the vouchers, the testimony on the subject was substantially as follows: As to $4,792.46 of "Hotel" expenses, $50. of "Dues and Memberships", $1,124.33 of

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* At the outset, it should be noted that petitioner under his estimate system, did not deduct particular expenses per voucher, but used the items to reach a fair over-all estimate of business entertainment and travelling expenses to be deducted (R. 1496-7).

** Exclusive of approximately $315,000. Federal and State Income taxes (R. 2881; 1932) and $47,153.91 Federal gift tax (R. 3339) reported and paid for 1936.

*** Only a few vouchers were ever shown to or examined by the jury.

"Cafe" expenses, totaling less than $6,000., there was testimony which tended to show that a substantial part of these expenses covered by vouchers was personal. But as to about one-half of even these items, the Government did not sustain its burden of proof. Thus the Government's proof involved a sum which must under the circumstances of this case be regarded as trivial.

In this state of the record, Government's Exhibit 148 (R. 2881-2) was admitted in evidence and this admission was prejudicial and serious error. It was prepared by Mr. Gibney, a revenue agent of twenty-years' experience. Gibney testified that the United States Attorney, Mr. Correa, directed its preparation and told him in detail what deductions to allow and to disallow (R. 1006-8). The exhibit was not shown to have been based on anything other than the arbitrary directions of Mr. Correa. Gibney testified as to which particular vouchers he allowed as deductions and which he disallowed, and the only basis that he gave for excluding vouchers was the direction of Mr. Correa.

It is startling that this exhibit allowed Schenck only $483.50 for business travelling and entertainment expenses for 1936.

Petitioner contends on this record that the admission of the exhibit was reversible error, for the following reasons:

(1) There is no basis in the evidence except the fact of Mr. Correa's direction to support the disallowance of expenditures as shown in the exhibit.

(2) Insofar as the exhibit purports to record what Mr. Correa said, it is hearsay.

(3) The admission of the exhibit cannot be supported as a hypothetical question, as contended by the Government, because the witness did not base the conclusions in the ex-

hibit on assumptions given to him, and the jury were not told what the factual bases were nor that these bases were only assumptions the correctness of which it was their function to decide.

(4) To the jury it represented the improper, disguised, expert testimony of Gibney.

II.

The erroneous refusal of the Trial Court to limit the issues to business expense deductions and the confusing charge regarding gambling.

The only charge in the second count of the indictment relates to the deductibility of business expenses and there is no charge of omitted income (R. 17). Nevertheless the Trial Court refused to instruct the jury (R. 1864) as follows:

> "The charge of fraud in the second count is limited to the claim of deductible expenses in the amount of approximately $40,000."

Because of its relevancy to a 1937 issue dealing with $100,000. of alleged unreported income, a great mass of evidence was admitted involving a 1936 election bet. This evidence tended to show that in 1936 petitioner, on instructions from Schenck, placed two cash bets totaling $25,000. against $15,000. that Roosevelt would be elected President (R. 325-6, 666-8, 676-683, 1561-2). After the election $40,000. cash was collected by petitioner and turned over to Schenck (R. 327, 329, 667-71, 677-80, 1561-2, 1577-8, 1685-92, 1752-3, 1768-9); but this item was not completely entered on Schenck's books. The gain was not, and we contend need not have been, reported on Schenck's tax return, because of offsetting losses (R. 1578, 2747, line 12 "Exchange"*).

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* Schenck's books carried gambling transactions under the caption of "Exchange" (R. 68).

Since the record teems with evidence bearing on this 1936 election bet, petitioner requested the instruction above quoted to remove all possibility of a jury verdict on these election bet winnings.

Not only did the Court refuse to charge as requested, but in fact gave a charge which must have been confusing to the jury and which allowed them to consider the element of gambling in 1936 as a ground for conviction (R. 1823).

In part, he further charged (R. 1839):

> "In order for you to find that sums received by the defendant Schenck *during any of the taxable years* constituted income to him, it is not necessary for the government to prove the exact source of that income.
>
> "If you find from the evidence in the case that the defendant Schenck had a net income from gambling transactions, the mere fact that he derived this income from gambling does not exempt him from reporting such income on his tax returns. *In other words, income derived from gambling is as taxable as income derived from any other source.*
>
> "You are to consider whether the defendant Schenck failed to report income from his gambling transactions * * *" (Italics ours.)

That the jury were in fact confused is shown by the request which they made for additional guidance during their deliberations and the colloquy which followed that request (R. 1855); also by the fact that petitioner was acquitted on counts one and three which involved similar business entertaining and travelling expenses, which were actually twice as great in 1937 as in 1936.

III.

In fundamental respects the jury were not correctly instructed on the law, and thus the petitioner was deprived of a fair trial.

(a) ***The jury were given conflicting instructions on the elements of the crime charged.***

The Court charged that in the first three counts the elements of the crime, for the years 1935, 1936 and 1937 were two: (1) whether defendant Schenck owed more than he reported; and (2) whether there was a wilful intent to evade and defeat any part of the tax by filing a fraudulent tax return (R. 1827).

Later, referring to count three, he charged that the mere fact that Schenck may have overpaid his income tax for 1937 did not excuse him or Moskowitz from criminal liability (R. 1838). To the jury and in fact, there could be no difference in the elements of the crime between 1937 and 1936. On the face of the charge, without reference to any detailed facts, it thus appears that the very nature of the crime for which the petitioner was convicted was defined in contradictory terms and must necessarily have been misleading. There was no way for the jury to tell whether or not as a matter of law a tax deficiency was an essential part of the crime.

The Court below recognizing the error, held it to be non-prejudicial, first, because the Trial Court had expressly referred to the acquittal year 1937, and second, because even assuming the charge applied to 1936, still the Trial Court had previously given the correct rule. Obviously, where the same charge gives the rule both correctly and incorrectly, a jury is not in a position to know which statement is correct.

(b) ***The Trial Court erroneously refused to charge that a deduction of a proper item claimed at the trial should be allowed even though not claimed on the tax return.***

There was evidence that Schenck had omitted to take in his income tax return certain deductions to which he was legally entitled. Petitioner requested a charge (R. 1862) that "even if the taxpayer did not claim the item at all in his return, if it be a proper adjustment he is entitled to it, and this rule must be taken into consideration in determining whether there was in fact any tax due over and above that which he paid".

The Trial Court refused the requested instruction and gave no instruction at all on this topic. There is nothing to show what, if any, of the deductions claimed in the return, the jury disallowed, and therefore it is impossible to say whether petitioner's proof of additional deductions would or would not have off-set the disallowed deductions.

(c) ***The Trial Court erroneously refused to define "ordinary and necessary" and substituted the test of "legitimate."***

The defense requested the Court to define the statutory words "ordinary and necessary" in the tax law relating to deductible business expenditures and in this connection to charge that in determining whether an expense was "ordinary" regard must be given to all the circumstances, including time, place, nature of business, nature of the individual, standards of the industry, expenses made by others in the same line of business, and other similar circumstances (R. 1868), and to define "necessary" as "appropriate and helpful" (R. 1868). The Court refused these requests and instead, defined "ordinary and necessary" as "legitimate" (R. 1841-2).

(d) ***The Trial Court erroneously instructed the jury as to the law dealing with the making of an estimate.***

In substance the Court charged (R. 1843) that where an item is partly business and partly personal the taxpayer may not apply an estimated percentage to that item if he "could obtain" information from which he could make an accurate allocation. The Court gave no limitation or qualification to the duty thus imposed of exhausting all possible means of obtaining information before the right to make an estimate arises.

This complicated case required the simplest and clearest statement from the Court as to the law on the important subject of estimates. The Court's charge was such that no lay jury could fairly be expected to understand it.

The Trial Court charged that an estimate could be made in only one particular way—by gathering together all possible information and by ruling out all purely personal items (R. 1842-3). It charged that this was "the situation" in which an estimate might be used. The Court below, by its affirmance, sanctioned this charge. The petitioner's method of estimating was different. He based deductions on an over-all picture of the taxpayer's expenditures, and provided for possible erroneous excesses by deliberately excluding some other items or categories of items which would have been deductible* (R. 1496-7; Ex. 88, R. 2747).

We contend that any fair system or method of estimating may be used, notwithstanding that two different men may not reach the same estimated deduction or follow the same route to an ultimate figure; and that the method used by petitioner was fair and proper.

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* Thus compensation was made to correct excesses, if any, in the so-called though minor 100% deducted categories. In fact these categories represented 100% of only California items, but the amounts were less than 100% of California and New York items, combined (R. 2747).

(e) ***The Trial Court gave erroneous instructions as to Schenck's right to deduct business entertainment expenses at home.***

The total amount of Schenck's expenditures for running his homes was $29,951.87 (Ex. 148, R. 2882). Of this amount Schenck claimed on his tax return 50% or $14,975.93 as estimated business deduction. There was evidence tending to show substantial entertainment at home for business purposes (R. 430-1; 473).

Because of the importance of the question in the instant case and because a lay jury might be apt to disregard entertainment expenses at home, the petitioner requested a charge that the tax law permits deductions for such entertainment expenses "whether at home or away from home" (R. 1862). The Court refused this charge and instead, told the jury that "traveling and living expenses while away from home and entertainment" can be deducted as business expenses (R. 1841). If the meaning of the charge as given was to exclude entertainment expenses at home, then the charge was erroneous because it gave an incorrect rule of law. If that was not the meaning of the charge then the charge was erroneous because it was ambiguous on an important subject where the petitioner was entitled to have the correct rule of law, as stated in the request, clearly given to the jury.

IV.

The erroneous exclusion of the testimony of Revenue Agent Mulligan.

A Revenue Agent, Mulligan, was subpoenaed by the defendants. When Mulligan was called to the stand counsel for the Treasury stated (R. 1249) that Treasury agents under the regulations (see appendix) are prohibited from testifying in any Court without permission of the Department,

under penalty of fine, imprisonment and dismissal. No permission had been obtained and the Court refused to let Mulligan testify. Counsel for the petitioner asked leave to make a record. The Court ruled:

> "I don't think there is any point in your making a record in view of what has taken place" (R. 1251).

It will be observed that the ruling of the Trial Court was not directed to the competency of the subject matter of any questions but to the competency of the witness in his capacity as a revenue agent. Again after some discussion the Court ruled:

> "It appears that no permission has been obtained and therefore it will be illegal and improper and a violation of the law to permit the witness to testify. In the absence of that the objection is sustained.
> "Mr. Corbin: Exception" (R. 1253).

It was the purpose of petitioner's counsel to ask this and other witnesses* questions concerning the practice of the Treasury Department with respect to estimating amounts to be allowed as deductions for business and entertainment expenses (R. 1254-5; 1254-66). The Court below ruled that no constitutional question was presented by the record because the only question propounded to Mulligan related to dividends in Schenck's returns for 1937. It ignored the fact that the Trial Court excluded the testimony not because the questions were incompetent but because it held that it was incompetent for the witness to testify.

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* Colin, Jacobs and Yarmis.

V.

The erroneous refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence.

The petitioner could not be convicted of the crime charged even if there were error in the returns, without wilful intent to evade. The evidence of character witnesses was material and important regarding such intent. The Court in its charge minimized the importance of this testimony (R. 1829-30). Counsel for petitioner requested a charge (R. 1861) approved by this Court in *Edgington* v. *U. S.*, 164 U.S. 361. The charge was refused. The specific point of difference between the charge as given and as requested was the very important one that character evidence might *itself,* considered with all the other evidence, be deemed sufficient to raise a reasonable doubt.

Questions Presented.

Petitioner was convicted of an attempt to evade or defeat the income taxes of Schenck for 1936. The affirmance below raises the following principal questions in connection with said crime:

I—Whether Government's Exhibit 148 was erroneously admitted in evidence.

II—Whether the refusal of the Trial Court to limit the issues to business expense deductions and its confusing charge regarding gambling constituted reversible error.

III—Whether the petitioner was fundamentally deprived of a fair trial because the jury were not correctly instructed on the law, through (a) conflicting instructions on the elements of the crime; (b) refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return, should be allowed; (c) refusal to define "ordinary and necessary" and substitution of the test of "legitimate"; (d) the erroneous instruction as to the law dealing with the making of an estimate; and (e) erroneous charge regarding deductibility of business entertainment expenses at home.

IV—Whether the exclusion of the testimony of a Revenue Agent subpoenaed by the petitioner constituted reversible error and deprived petitioner of constitutional rights.

V—Whether the refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence constituted reversible error.

REASONS FOR WRIT OF CERTIORARI

I.

The erroneous admission of Exhibit 148.

a) The decision of the Court below holding admissible Exhibit 148 is in conflict with a decision of another Circuit Court of Appeals on the same matter. The Circuit Court of Appeals of the Seventh Circuit held that testimony of an expert witness which invaded the province of the jury is erroneously admitted.

U. S. v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7).*

b) This Court granted a writ of *certiorari* in the *Johnson* case on February 2, 1942, and thus has the question here presented pending for consideration before it. The case has now been assigned for reargument next October.

c) Two important questions of federal law, both of which are novel in this Court, are involved: (a) whether a tax deficiency can be proved by an unsupported exhibit of this character based on directions of the United States Attorney; and (b) whether conviction of the crime of tax evasion can properly be based on such an exhibit.

d) To the jury, this was an unrecognized disguise for the improper expert testimony of the expert Gibney. In a criminal case, such a device creates confusion as to its meaning and has an incalculably vicious effect. Its use should not be permitted in the interests of the fair administration of justice.

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* The Court below recognized the existence of the conflict in its opinion which said: "The appellants urge that such a ruling is contrary to *U. S.* v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7). We are disposed to think that case distinguishable; if not, we prefer to follow Judge Evans' dissent."

e) The decision of the Court below by its affirmance of the admissibility of Exhibit 148, in view of the circumstances, has so far sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II.

The erroneous refusal of the Trial Court to limit the 1936 issue to business expense deductions and the confusing charge regarding gambling.

In holding that the Trial Court committed no reversible error in refusing to charge and in charging as it did, the Court below applied a test for reversible error which is in conflict with and disregards the established rule of law, that where there is a *fair possibility* that the jury may have been misled, reversible error has been committed.

III.

The petitioner was deprived of a fair trial in that the jury was not adequately instructed as to the fundamental questions of law involved.

The Court below has erroneously decided important questions of federal tax law and criminal law, which have not been but should be settled by this Court.

The Court below has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by the Trial Court as to call for an exercise of this Court's power of supervision.

The Court below has decided federal questions in a way probably in conflict with applicable decisions of this Court,

to-wit: that the test of reversible error, due to ambiguity, erroneous instruction, or entire lack of instruction, is whether or not there is a fair possibility that the jury may have been misled, or may not have applied the correct law.

As to the features of tax law involved, these questions are novel and affect many thousands of taxpayers and are therefore of fundamental importance.

The decision of the Court below holding that the concededly erroneous charge was non-prejudicial on the ground that the Trial Court had previously given a correct charge on the elements of the crime is in probable conflict with applicable decisions of this Court,

Mills v. *U. S.*, 164 U. S. 644

and is also in conflict with decisions of other Circuit Courts of Appeals on the same matter.

Nicola v. *U. S.*, 72 F. (2d) 780 (C. C. A. 3);
Kuhn v. *U. S.*, 42 F. (2d) 210 (C. C. A. 3).

To the extent that the Court below sanctioned admittedly conflicting instructions, the opinion is palpably erroneous on its face.

The refusal to charge as requested was in conflict with the rule of this Court that it is reversible error for a Trial Court to refuse to grant a request outlining the elements of a crime specifically set forth in a statute, and that there is an implied direction to enumerate such elements, when a request therefor is made.

IV.

The erroneous exclusion of the testimony of Revenue Agent Mulligan.

The holding of the Court below that a specific offer of evidence was needed and that no constitutional question was presented by the record is in conflict with the holding of this Court in *McCandless* v. *U. S.*, 298 U. S. 342 that a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the Trial Court during a preliminary argument or colloquy.

The refusal of the Court below to pass on a constitutional question presented deprives petitioner of his constitutional rights under the Sixth Amendment.

V.

The erroneous refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence.

The instruction approved by the Court below was so one-sided as to constitute an improper comment in violation of the principles laid down by this Court in *Quercia* v. *U. S.*, 289 U. S. 466.

This question has not been passed on by this Court since *Edgington* v. *U. S.*, 164 U. S. 361 (1896). Confusion on the subject exists in the opinions of various Circuit Courts of Appeals.

WHEREFORE, your petitioner prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send

to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

Dated, New York, N. Y., May 7, 1942.

JOSEPH H. MOSKOWITZ,
Petitioner.

By JOHN W. DAVIS,
Counsel for Petitioner.

BERTRAM S. NAYFACK,
RUSSEL S. COUTANT,
A. H. FRISCH,
Of Counsel.